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No. 01-729

In the
Supreme Court of the United States

RONALD O. OTTE AND BRUCE M. BOTELHO,
Petitioners,

v.

JOHN DOE I, ET AL.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*, AND BRIEF *AMICUS CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

Pursuant to Supreme Court Rule 37.3(b), The Reporters Committee for Freedom of the Press and move this Honorable Court for leave to file an *amicus curiae* brief in support of the Petitioners. The brief *amicus curiae* follows this motion.

Petitioners have consented to the filing of the attached brief; Respondents have withheld consent.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

Amicus is concerned with a subsidiary issue in this case; specifically, whether the dissemination of information can be considered a "punishment." The Ninth Circuit's ruling in this case is troubling because it implies that the dissemination of information, much of which is contained in a public record, could be deemed a "punishment" and restricted for that reason. Amicus is concerned that the Ninth Circuit's interpretation of the law could result in overbroad restrictions on the dissemination of information contained in public records.

The petitioners' speak from the perspective of government officials, while amicus is concerned with the effect on the news media. The interests of the two are not the same, and amicus wish to write separately to emphasize the implications of this decision for a free press. Given the ramifications of a

decision in this area for First Amendment and access interests, *amicus curiae* respectfully requests that this Court grant it leave to file the attached brief.

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INTEREST OF *AMICUS CURIAE*[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interest of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Reporters Committee has a strong interest in a subsidiary issue in this case: whether the dissemination of information contained in government records can properly be classified as "punishment." Placing restrictions on the dissemination of information about those who have been convicted of crimes potentially infringes on the First Amendment rights of the public and press, and limits the ability of the public to oversee the workings of its government.

Amicus takes no position on the issue of whether the registration requirements of the Alaska law are valid. *Amicus*' interests lie solely in the interpretation of the "notification" portion of the statute.

Regardless of any other holding the Court may make in this case, *amicus* urges this Court to find that the dissemination of information contained in government records cannot properly be classified as "punishment."

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[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amicus curiae* declare that they authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *amicus* made a monetary contribution to the preparation and submission of this brief. Consent to file this brief was not obtained from the Respondent; a motion for leave to file this brief precedes this section.

SUMMARY OF ARGUMENT

Sex offender notification laws do not violate the Ex Post Facto Clause of the U.S. Constitution because they do not increase the punishment for a crime. Criminal convictions are a matter of public record, and members of the public already have the right to look up conviction information at the courthouse. The public nature of the conviction has not changed merely because the public is now permitted to look up the conviction information in another format.

The means of dissemination should not be a factor in determining whether the notification portion of the Alaska statute is valid. Making information available on the Internet is as legitimate as providing it at a police station or other government office. The notification provision is not invalid merely because the information is available to any interested member of the public. There has never been a requirement that conviction information be restricted to only a small group of "professionals" or experts.

The goal of the law is not to "punish" but to provide information to help the public protect itself. This goal is not outweighed by the embarrassment that may come to a convicted offender. The risk of embarrassment existed prior to the enactment of the law, as conviction information was already a matter of public record.

Any potential risks to the convicted offenders, such as vigilantism, or discrimination in housing or employment, are better remedied by enacting or enforcing laws barring such conduct. Restricting access to conviction information would be far more dangerous, as it would permit dangerous offenders to take advantage of the public's ignorance.

Amicus does not take a position on whether the

registration requirements in the statute are valid.[2]

ARGUMENT

I. Release of government information in a sex offender registry does not violate the Ex Post Facto clause of the U.S. Constitution.

Numerous state and federal courts have considered whether sex offender registry laws constitute an Ex Post Facto law. While the vast majority of sex offender registry laws have been found to be constitutional,[3] two have not.[4]

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[2] *Amicus*' concern is solely with the notification portion of the statute, not the registration requirement. *Amicus* recognizes that there are certain issues that arise because of the registration requirement that are not otherwise addressed herein. For example, the state requires registrants to provide information that may not have been in the original conviction record, such as current address and employer. *Amicus* takes no position on whether it is appropriate for the state to require a registrant to provide such information. However, once the information is collected, assuming this Court finds that the state may collect such information, it should be made available along with the conviction information that was part of the original criminal record because such information is necessary for the public to correctly identify the convicted offender and distinguish him from other citizens with the same name. It also aids the public in self-protection. The fact that additional information may be required upon registration should not be used to invalidate the notification portion of the statute, because it is still the publication of the *conviction* that the offenders wish to avoid.

[3] *See*, *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000); *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999); *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997); *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997); *Artway v. Attorney Gen. of N.J.*, 81 F.3d 1235

(continued...)

Almost all of the laws have two components: a registration requirement and a notification provision. Some courts have evaluated the two components together, others have evaluated them separately.

In this case, the Ninth Circuit noted that it considered the two components together, finding that the law, as a whole, was an Ex Post Facto law in violation of the constitution. *Amicus*, however, will address only one component: the notification provision. *Amicus*' primary concern is the Ninth Circuit's suggestion that it is a "punishment" to provide convenient public access to material that is presumptively already part of a public record.

Amicus does not claim that states must provide internet sex offender registries or draft a "Megan's Law" in any particular way. *Amicus* contends only that those states that choose to provide information via the Internet may do so without violating the Constitution.

A. The law does not violate the Ex Post Facto Clause because convicted sex offenders already had "fair warning" that the public would be

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[3](...continued)
(3d Cir. 1996); *Snyder v. State*, 912 P.2d 1127 (Wyo. 1996); *Doe v. Poritz*, 662 A.2d 367 (N.J. 1995); *State v. Costello*, 643 A.2d 531 (N.H. 1994); *State v. Ward*, 869 P.2d 1062 (Wash. 1994); *State v. Noble*, 829 P.2d 1217 (Ariz. 1992); *Patterson v. Alaska*, 985 P.2d 1007 (Alaska Ct. App. 1999); *Williford v. Bd. of Parole*, 904 P.2d 1074 (Or. App. 1995); *People v. Starnes*, 653 N.E.2d 4 (Ill. App. 1995); *State v. Manning*, 532 N.W.2d 244 (Minn. App. 1995).

[4] See *Kansas v. Myers*, 923 P.2d 1024 (Kan. 1996) and the Ninth Circuit's decision in the present case, *Doe v. Otte*, 259 F.3d 979 (9th Cir. 2001).

permitted to access information about their convictions.

Ex Post Facto laws are disfavored because law should give the public "fair warning" of what is prohibited and how improper conduct will be punished. *Doe v. Otte*, 259 F.3d 979, 982 (9th Cir. 2001); *Doe v. Pataki*, 120 F.3d 1263, 1273 (2d Cir. 1997). The notification provision of sex offender registry laws do not violate this principle. Under the open American court system, any accused person knows that the trial will be a public trial and any potential conviction will be a matter of public record. A convicted sex offender — or any convicted criminal — cannot credibly argue that he lacked "fair warning" that the public may learn of his conviction.

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), this Court ruled that the public and the press have a First Amendment right to open criminal trials. Since then, this Court has consistently affirmed the presumptive right of access to many aspects of a criminal proceeding. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (holding that statute mandating closure of courtrooms during minor victims' testimony was unconstitutional); *Press Enterprise Co. v. Superior Court (Press Enterprise I)*, 464 U.S. 501 (1984) (reversing California state court's closure of voir dire); *Waller v. Georgia*, 467 U.S. 39 (1984) (closure of criminal suppression hearing was overbroad and unconstitutional); *Press Enterprise Co. v. Superior Court (Press Enterprise II)*, 478 U.S. 1 (1986) (finding qualified right of access to pretrial hearings, and noting that First Amendment scrutiny must be applied); and *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147 (1993) (closure of preliminary hearing was unconstitutional).

This Court has cited numerous policy reasons in favor of open court proceedings, recognizing that our justice system does more than merely punish criminals. Providing access to

and information about criminal proceedings ensures "the proper functioning of a trial." *Richmond Newspapers*, 448 U.S. at 569. Access allows "the public to participate in and serve as a check upon the judicial process -- an essential component of our structure of self government." *Globe Newspapers*, 457 U.S. at 606. Public scrutiny also promotes fairness by operating as a restraint on possible abuses of judicial power, as well as providing a safeguard against "any attempt to employ our courts as instruments of persecution." *In re Oliver*, 333 U.S. 257, 270 (1984). Openness also enhances public confidence in judicial proceedings. *Press Enterprise I*, 464 U.S. at 509. Finally, open proceedings have a "community therapeutic value." *Richmond Newspapers*, 448 U.S. at 571. Open proceedings provide an outlet for the public's concern and emotions that result from criminal acts. Openness also vindicates the concerns of the victims of crime, the community and defendants in knowing that the criminal system operates fairly and justly. *Press-Enterprise I*, 464 U.S. at 509.

The principles outlined in *Richmond Newspapers* and its progeny present a clear picture of the values associated with the American legal system. Those who are accused of crimes are given numerous protections to ensure that their trials are fair. The public is given the opportunity to oversee the justice system and ensure that powers are not abused. And victims and communities are provided with a mechanism to help overcome the damage caused by criminal activity. Each of these principles are further supported by permitting the dissemination of information about criminal proceedings, even after the trial has ended. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) (finding a common law right of access to judicial records).

The fact that criminal court records are open to the public means that information about the sex offender's conviction

would be available to the public even without a registry law. *Russell v. Gregoire*, 124 F.3d 1079, 1094 (9th Cir. 1997); *Doe v. Pataki*, 120 F.3d 1263, 1280 (2d Cir. 1997); *Patterson v. Alaska*, 985 P.2d 1007, 1016 (Alaska App. 1999). Thus, allowing access to information about their convictions can hardly be an Ex Post Facto "punishment," as access to information about any criminal conviction was a fundamental attribute of the justice system at all times in American history. *Id.*

The Ninth Circuit has now determined that the public access to such a conviction is an "increased punishment" for the purpose of the prohibition against Ex Post Facto legislation. But the law does not increase the penalty. The threat of public knowledge of one's crime has always been present. Such a ruling cannot stand where the conviction was a matter of public record:

> [T]he historical evidence demonstrates conclusively that at the time when our organic law were adopted, criminal trials both here and in England had long been presumptively open. This is no quirk of history; rather it has long been recognized as an indispensable attribute of an Anglo-American trial.

Richmond Newspapers, 448 U.S. at 569. Thus, regardless of when the Respondents were convicted of their crimes, they should have expected that their convictions would be a matter of public record, available to any member of the public for any reason. Allowing access to information about their convictions can hardly be an Ex Post Facto "punishment." The information was available to the public at the time of their conviction, and would continue to be available under the notification portion of the act.

B. The sex offender notification laws do not constitute an Ex Post Facto punishment because dissemination of information has never been regarded as punishment when done in furtherance of a legitimate government interest.

The analysis *amicus* supports was applied by the Tenth Circuit in *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000). In *Femedeer*, a convicted sex offender challenged Utah's notification law, claiming that it was an Ex Post Facto punishment. The law permitted public access to sex offender registry information and provided access via the Internet. The court rejected the offender's arguments, finding that notification was not a punishment.

The court noted that "the threshold inquiry for assessing a violation of the Ex Post Facto Clause . . . is whether Utah's Internet notification program constitutes additional criminal punishment for the crimes previously committed by those subject to its provisions. . . . If the notification measures are deemed civil rather than criminal in nature, they present no ex post facto violation." *Femedeer*, 227 F.3d at 1248 (*citing Kansas v. Hendricks*, 521 U.S. 346, 371 (1997)).

The court found that the notification law did not impose a disability or restraint traditionally associated with a "punishment." Under the law, convicted offenders are "free to live where they choose, come and go as they please, and seek whatever employment they may desire." *Id.* at 1250. Although notification may result in negative consequences, such consequences are not part of a punishment imposed by the state, but rather part of the legitimate procedures we use for open government:

> Dissemination of information about criminal activity has always held the potential for substantial negative consequences for those involved in that activity. Dissemination of such information in and of itself, however, has never been regarded as punishment when done in furtherance of a legitimate government interest. When there is probable cause to believe that someone has committed a crime, our law has always insisted on public indictment, public trial, and public imposition of a sentence, all of which necessarily entail public dissemination of information about the alleged activities of the accused.

Id. at 1251 (*quoting E.B. v. Verniero*, 119 F.3d 1077, 1099-1100 (3d Cir. 1997)). *See also*, *Cutshall v. Sundquist*, 193 F.3d 466, 475 (6th Cir. 1999) ("The Act provides for the collection and dissemination of information; [the convicted offender] has not cited, and we have not found, any evidence that dissemination of information has historically been considered punishment.").

The Tenth Circuit also correctly noted that, as a practical matter, notification does not impose the information upon the public, but merely makes it available for interested persons to review.

> Under Utah's law, registry information is made widely available, but it is not broadcast in a manner approaching the historical examples of public shaming. Interested individuals must still make an affirmative effort to retrieve the information. Internet notification works merely a technological extension . . . in our nation's long history of making information public regarding criminal offenses.

Femedeer, 227 F.3d at 1251.

Thus, the court concluded that providing access to information provides legitimate civil benefits, consistent with our tradition of allowing public access to criminal case information, and the notification law cannot therefore be

deemed a "punishment" in violation of the Ex Post Facto Clause. *Id* at 1253.[5]

C. The scope of notification permitted by the Alaska statute is irrelevant.

One of the recurring issues in sex offender registry cases is the scope of the notification provision. Courts have been likely to find that the notification provision does not constitute a "punishment" when the notification is limited. *See, e.g. Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997) (finding Washington state's registry law to be constitutional where notification is limited by a threat classification and by geographic area). Other courts have found that the scope of notification is irrelevant. *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000) (finding that Utah's law allowing unrestricted internet access to sex offender registry information is constitutional).

In the present case, the Ninth Circuit found that the notification provision constitutes a "punishment" because it is not limited in scope.

The Ninth Circuit ruled the Ex Post Facto Clause prohibits states from enacting laws that change a punishment or inflict a greater punishment than the law applied to the crime at the time it was committed. *Doe v. Otte*, 259 F.3d 979, 984-85 (9th Cir. 2001) (*citing Calder v. Bull*, 3 U.S. 386 (1798)). But the fact of a sex offender's conviction and the information pertaining to his conviction were matters of

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[5] The Tenth Circuit also ruled that the plaintiff could not pursue his claim anonymously, as anonymity would violate the principle that court proceedings should be open and provide information to the public.

public record available to the public at the time of his conviction. The state has now provided an alternate method of permitting the public to research the same information. The fact that the new method of research may be easier and more convenient for the public does not mean that there is an "increased punishment" for the convicted offender.

The "notification" portion of the act does not mean that the state affirmatively notifies the public of the offender's information; it merely makes the information available for interested persons to review. As the Tenth Circuit noted, the information is not broadcast. Interested individuals must still make an affirmative effort to retrieve the information. *Femedeer*, 227 F.3d at 1251.

In essence, the notification provision permits a citizen to research public records more simply. Prior to the enactment of the law, the interested person would have to go to the courthouse and look through files to see who had been convicted of a sex offense or look up a certain person by name. Now, the state has that information available in one searchable database. The research process has been made easier, but by no means is the offender's name being broadcast all over the community.

The Ninth Circuit thought that the state should make a distinction between sex offenders who have been adjudged likely to offend again and those who have not, and should impose other limits on notification. The court implied that it is possible for a cadre of "experts" to figure out who will offend again and the state should notify the public only when there is a reason to believe the convicted felon will offend again. However, such a requirement is neither reasonable nor necessary. Experts, while they may have plenty of experience to make judgments, are not seers. Legislatures have passed notification laws to permit the public to protect themselves, precisely because the state cannot protect all citizens in all

places at all times. Limiting the flow of information to those places and people who the state deems "at risk" wholly invalidates the underlying principle of the notification laws.

D. The law fulfills non-punitive goals, which are not overcome by potential difficulties to known offenders.

In this case, the Ninth Circuit recognized that there is an important non-punitive goal to be achieved by the law: protecting the public. *Doe v. Otte*, 259 F.3d 979, 991 (9th Cir. 2001).

The primary argument against public notification seems to be that there may be negative consequences resulting from notification, such as inability to find a residence or a job, due to public reaction. These, consequences, however, are not government imposed, nor are they required "punishment." But most importantly, they are consequences that could have resulted even before the passage of the registry law.

As the Ninth Circuit noted in a previous case, "the potential ostracism and opprobrium that may result from notification is not inevitable." *Russell*, 124 F.3d at 1092. The court also found that its "inquiry into the law's effects cannot consider the possible 'vigilante' or illegal responses of citizens to notification." *Id.* Although there are undoubtedly possible negative consequences resulting from public access to sex offender registries, such consequences are not beyond the consequences that may result from the existing public access to the original conviction records. Notification provisions merely make it easier for the public to obtain the already-public information by permitting an interested person to quickly review one database rather than having to look through numerous records. Public access to the information has not changed, and making public access easier does not

"enhance" the penalty or consequences to the convicted offender.

In *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997), the convicted offenders argued that the law constituted a "punishment in fact" because notification had damaging effects on their lives, including ostracism, threats of violence, arson, eviction and other physical attacks. *Id.* at 1278-79. However, the court correctly noted that such consequences could not be fairly attributed to the law itself. Although any given member of the public might not have known of the offender's conviction "but for" the law, the resulting incidents were not imposed by the law:

> The incidents (1) are wholly dependent on acts by private third parties, (2) result from information most of which was publicly available prior to the [notification law], and (3) flow essentially from the fact of the underlying conviction.

Id. at 1280. The Second Circuit recognized that most of the information available under the notification provision of the law was publicly available from other sources. The court also recognized that a convicted criminal must expect some negative consequences from his conviction, even after his sentence is complete:

> The societal consequences that flow from a criminal conviction are virtually unlimited. Individuals may lose their jobs or be foreclosed from serving in future professions; their marriages are destroyed; they may be plunged into poverty. Some individuals may be deported, . . . and others may lose their homes. . . . Virtually all individuals who are convicted of serious crimes suffer humiliation and shame, and many may be ostracized by their communities.

Id (ellipses in original). The court recognized that hostile acts

against convicted sex offenders may therefore occur, but they are nevertheless illegal and not condoned by the statute. *Id.* The purpose of the statute is to inform the public and permit them to take reasonable action to protect themselves; anticipated action — such as preventing one's children from being alone with an offender — is reasonable and appropriate to achieve nonpunitive ends. *Id.* Thus, the court found that "[w]hatever incremental burdens upon convicted sex offenders arise from public notification are not 'so disproportionately severe and so inappropriate to nonpunitive ends' as to constitute punishment." *Id.*

In this case, Respondents' argument seems to be that it is embarrassing for information about their sex offender status to be readily available to the public. The question, however, is whether their embarrassment is a punishment.

It is logical and reasonable to expect a person who has been convicted of a crime to be embarrassed by the conviction. And only the most perverse members of society would *not* be embarrassed by a conviction for a sexual offense. But, presumably, such embarrassment is part and parcel of the initial conviction and the inherently public nature of the initial criminal trial.

The fact that members of the community may become aware of an offender's conviction in the future, causing additional embarrassment, cannot be said to be an additional punishment. Any convicted criminal, for any offense, will always run the risk of embarrassment when others learn of the conviction. Such discomfort cannot be escaped, nor should the government be expected to ease their concerns by helping offenders hide — or keep as non-public as possible — the existence of their conviction.

Committing a crime is an inherently public act. It affects other members of the public, it is prosecuted by the public, in

a public courtroom, in the public's name. To claim that the fact of conviction is somehow entitled to be kept from the public is incomprehensible.

The interests favoring the sex offenders, such as preventing vigilantism, ostracism or vengeance, can more appropriately be met with remedies tailored to those interests and without infringing on the public's right of access to public information. The states could enact laws that prevent discrimination in housing or employment based on sex offender status, and they could prosecute any citizen that attacks or otherwise harms a sex offender due to his or her status. But the state should not be forced to limit the dissemination of information about crimes, especially when the original material is a matter of public record.

E. Ruling that the dissemination of information can be a "punishment" may result in undesirable results.

If this Court were to rule that the dissemination of information could be deemed a "punishment," *amicus* is concerned that the ruling may be used as a basis for limiting access to criminal court records or other materials that are otherwise available to the public. It may limit states from providing information under state laws governing access to government records, which could result in terrible consequences.

For example, parents and childcare employers regularly use criminal court records to determine whether childcare applicants have prior convictions for sexual abuse of minors or other violent crimes. If the release of such information could be a "punishment" and access to the information was therefore restricted, private childcare employers would not be able to determine which applicants pose a risk. Convicted

felons may not voluntarily reveal their conviction, and private persons would have no other means of checking their background.

As noted above, any concerns regarding improper discrimination in employment or housing would be better remedied by legislation outlawing such discrimination. But the dissemination of information should not be restricted.

CONCLUSION

Amicus takes no position with regard to the registration requirement of the law at issue, but respectfully requests that this Court find that the notification portion of the law is constitutional. The notification portion of the law does not violate the Ex Post Facto Clause of the U.S. Constitution because it does not increase the punishment for the crime committed.

Respectfully submitted,

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